

October 11, 2005

AO DRAFT COMMENT PROCEDURES

The Commission permits the submission of written public comments on draft advisory opinions when proposed by the Office of General Counsel and scheduled for a future Commission agenda.

Today, DRAFT ADVISORY OPINION 2005-14 is available for public comments under this procedure. It was requested by counsel, Andrew C. Selden, Esq., and Neal T. Buethe, Esq., on behalf of the Association of Kentucky Fried Chicken Franchisees, Inc. ("AKFCF").

Proposed Advisory Opinion 2005-14 is scheduled to be on the Commission's agenda for its public meeting of Wednesday, October 19, 2005.

Please note the following requirements for submitting comments:

1) Comments must be submitted in writing to the Commission Secretary with a duplicate copy to the Office of General Counsel. Comments in legible and complete form may be submitted by fax machine to the Secretary at (202) 208-3333 and to OGC at (202) 219-3923.

2) The deadline for the submission of comments is 12:00 noon (Eastern Time) on October 18, 2005.

3) No comments will be accepted or considered if received after the deadline. Late comments will be rejected and returned to the commenter. Requests to extend the comment period are discouraged and unwelcome. An extension request will be considered only if received before the comment deadline and then only on a case-by-case basis in special circumstances.

4) All timely received comments will be distributed to the Commission and the Office of General Counsel. They will also be made available to the public at the Commission's Public Records Office.

CONTACTS

Press inquiries: Robert Biersack (202) 694-1220

Commission Secretary: Mary Dove (202) 694-1040

Other inquiries:

To obtain copies of documents related to AO 2005-14, contact the Public Records Office at (202) 694-1120 or (800) 424-9530.

For questions about comment submission procedures, contact Rosemary C. Smith, Associate General Counsel, at (202) 694-1650.

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FEDERAL ELECTION COMMISSION
Washington, DC 20463

October 11, 2005

MEMORANDUM

TO: The Commission

THROUGH: Robert J. Costa
Acting Staff Director

FROM: James A. Kahl
Deputy General Counsel

Rosemary C. Smith
Associate General Counsel

Brad C. Deutsch
Assistant General Counsel

Jonathan M. Levin
Senior Attorney

Subject: Draft AO 2005-14

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for October 19, 2005.

Attachment

1 ADVISORY OPINION 2005-14

2
3 Andrew C. Selden, Esquire

4 Neal T. Buethe, Esquire

5 Briggs and Morgan

6 2200 IDS Center

7 80 South Eighth Street

8 Minneapolis, Minnesota 55402

9
10 Dear Messrs. Selden and Buethe:

DRAFT

11 We are responding to your advisory opinion request on behalf of the Association of
12 Kentucky Fried Chicken Franchisees, Inc. (“AKFCF”) and its separate segregated fund
13 (“AKFCF PAC”), concerning the application of the Federal Election Campaign Act of 1971, as
14 amended (the “Act”), and Commission regulations to AKFCF’s status as a federation of trade
15 associations and its ability to solicit contributions to AKFCF PAC from the solicitable class of
16 incorporated Kentucky Fried Chicken (“KFC”) franchisees that are members of AKFCF’s
17 regional trade associations, and from unincorporated franchisees, including individuals, that are
18 members of the regional trade associations.

19 The Commission concludes that AKFCF is a federation of trade associations comprised
20 of affiliated regional trade associations that are, in turn, comprised of KFC franchisees. Hence,
21 AKFCF and AKFCF PAC may solicit the owners and executive and administrative personnel of
22 the incorporated franchisee-members of the regional trade associations, and the families of those
23 individuals, for contributions to AKFCF PAC. AKFCF and AKFCF PAC may also solicit
24 contributions from franchisee-members who are individuals or unincorporated entities.

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26
27
28 ***Background***

1 The facts of this request are presented in your letter and attachments received on July 20,
2 2005, and follow-up letters and e-mail communications received between August 1 and
3 September 15, 2005.

4 *1. AKFCF, the regional associations, and AKFCF PAC*

5 AKFCF is a Georgia corporation that characterizes itself as a trade association.
6 AKFCF's articles of incorporation provide that it functions "as a business league as that term is
7 used in Section 501(c)(6) of the Internal Revenue Code," that it "is not organized and shall not
8 be operated for pecuniary gain or profit" and that no income or profit shall "be distributable to or
9 inure to the benefit of its members, directors, officers, or any other individual." AKFCF Articles
10 of Incorporation, Articles III and IV. AKFCF's only members are ten separately incorporated
11 regional associations, the members of which are franchisees of KFC Corporation.¹

12 The articles of incorporation and/or by-laws of five of the seven domestic regional
13 associations contain provisions similar to those found in AKFCF's articles of incorporation with
14 respect to functioning as a business league, to their status as non-profit organizations and
15 operations, and to the non-distribution of income or profits. Regarding the remaining two
16 domestic regional associations, the Northwest association is officially organized as a Washington
17 State for-profit organization and the Southern California association is organized under the broad
18 category of California "nonprofit mutual benefit corporation." However, you represent that
19 these two regional associations also conduct themselves in a manner consistent with the
20 provisions described above; they are non-stock membership associations functioning as non-

¹ AKFCF consists of seven domestic and three international regional associations. The seven domestic regionals are Southeast, Northeast, Great Lakes, Upper Midwest, Northwest, Southern California, and Southwest. The international regionals are Caribla (Caribbean and Latin America), Canada, and Mexico. You state that members of the international regional associations will not be solicited for contributions to AKFCF PAC and that "non-U.S. Region officers are not on the AKFCF PAC Board."

1 profits, no dividend or profits are ever paid to the members, and any annual surplus is used in
2 programming sponsored by the association for its members.

3 The regional associations are composed of members who are KFC franchisees. These
4 franchisee-members are all either closely-held corporations, limited liability companies
5 (“LLCs”), partnerships, or individuals.

6 In 2005, AKFCF established a separate segregated fund (“SSF”), AKFCF PAC, “in order
7 to support conditions that favor federal legislation favorable to franchisees.” AKFCF PAC filed
8 its Statement of Organization with the Commission on June 2, 2005. None of the regional
9 associations sponsors its own SSF.

10 *2. Purpose of AKFCF and the regional associations*

11 AKFCF was formed in 1975 to coordinate the activities of the regional associations that
12 either had been formed or were then being formed. Among AKFCF’s stated purposes are
13 fostering and coordinating the activities of the regional associations, developing the industry
14 composed of KFC franchised food outlets, improving the nature of services in the industry,
15 encouraging inventiveness and communication within the industry, and securing for the industry
16 fair and equitable treatment in transactions with manufacturers of, and dealers in, supplies.
17 AKFCF Articles of Incorporation, Article III. The stated purposes of the regional associations
18 vary but each is organized to promote the mutual interests of the KFC franchisees in its own
19 region.

20 *3. Structure of AKFCF and the regional associations*

21 The AKFCF by-laws set forth the role of the leaders of the regional associations in
22 governing AKFCF, and, in turn, the seven domestic regional associations’ by-laws indicate the
23 role of the members of each regional association in selecting those leaders who govern AKFCF.

1 The affairs of AKFCF are “managed by, or under the direction of,” its Board of Directors.
2 AKFCF By-laws, Section 4.1. The Board is composed of three high-ranking officers from each
3 of the regional associations. AKFCF By-laws, Section 4.2. At its annual regular meeting, the
4 AKFCF Board appoints five “Principal officers” for one-year terms. The Immediate Past
5 President and the Principal officers sit on the Board and manage AKFCF’s day-to-day affairs.
6 AKFCF By-laws, Sections 4.2, 4.7, 5.1, and 5.2. Each Principal officer must be either a director
7 already, or a past or current officer of one of the regional associations and a member in good
8 standing of that association.² AKFCF By-laws, Section 5.1.

9 The by-laws of the seven domestic regional associations indicate that their high-ranking
10 officers are elected by their franchisee-members, and that most or all of their directors are
11 elected directly by their franchisee-members. Generally, the directors and high-ranking officers
12 of the regional associations must be franchisee-members of the association or, in the case of
13 franchisees that are not individuals, representatives of those franchisees.

14 ² A Director “must be and remain” either (i) a “Principal officer” as described by the AKFCF By-laws; or (ii) a person franchised by the KFC Corporation, or by a KFC licensee or affiliate, to operate a KFC food outlet, or a shareholder or principal officer of such franchisee. That director must also be a member in good standing of the regional association that appointed him or her, and not an employee of KFC Corporation’s parent company or its affiliates. AKFCF By-laws, Section 4.3.

Questions Presented

1. *Is AKFCF a federation of trade associations comprised of regional trade associations that are affiliated with AKFCF?*
2. *May AKFCF or AKFCF PAC solicit the owners and executive and administrative personnel of the incorporated franchisee-members of the domestic regional associations, and the families of those individuals, for contributions to AKFCF PAC? May AKFCF or AKFCF PAC solicit contributions from unincorporated franchisee-members, including individuals, of the domestic regional associations?*

Legal Analysis and Conclusions

1. *Is AKFCF a federation of trade associations comprised of regional trade associations that are affiliated with AKFCF?*

Yes, AKFCF is a federation of trade associations comprised of regional trade associations that are affiliated with AKFCF.

Commission regulations define a trade association as:

generally a *membership organization* of persons engaging in a similar or related line of commerce, organized to promote and improve business conditions in that line of commerce and not to engage in a regular business of a kind ordinarily carried on for profit, and no part of the net earnings of which inures to the benefit of any member.

11 CFR 114.8(a) (emphasis added). Accordingly, in order to qualify as a trade association, an association must first qualify as a membership organization under Commission regulations.

AKFCF and each of the domestic regional associations qualifies as a membership organization under Commission regulations. Specifically, AKFCF and the domestic regional associations are composed of persons (*i.e.*, entities and individuals) that are “members” as defined by the Act and regulations, in that the persons must satisfy the membership requirements set out in their respective by-laws, affirmatively accept an invitation to become a member, and,

1 with the exception of a few classes in some of the domestic regional associations, pay annual
2 membership dues of a pre-determined amount specified by the Boards or by-laws of AKFCF or
3 the domestic regional associations.³ 11 CFR 100.134(f) and 114.1(e)(2). With respect to the
4 definition of “membership organization,” all of the members of AKFCF and at least some of the
5 members of each domestic regional association, as Board members or officers, have the authority
6 to operate their respective association pursuant to their by-laws. AKFCF and each domestic
7 regional association sets out the membership requirements in its by-laws and, as evidenced by
8 their web sites, the domestic regional associations expressly solicit persons to become members.
9 The Commission assumes that AKCF and each domestic regional association makes its formal
10 organizational documents available to its members upon request and expressly acknowledges the
11 acceptance of membership. Finally, neither AKFCF nor the regional associations is organized
12 primarily for the purpose of influencing an election of any individual to Federal office. 11 CFR
13 100.134(e) and 114.1(e)(1).

14 AKFCF and each of the domestic regional associations also qualifies as a trade
15 association in accordance with 11 CFR 114.8(a). Each is a membership organization of persons
16 engaging in a similar line of commerce, and each is organized to promote and improve business
17 conditions in that line of commerce. Neither AKFCF nor any of the domestic regional
18 associations is organized to engage in a regular business of a kind ordinarily carried on for profit.
19 Moreover, no part of the net earnings of AKFCF or any of the domestic regional associations
20 inures to the benefit of any member.⁴

³ In each of the seven domestic regional associations, the requirements for all of the membership classes consisting of franchisees include the obligation to pay annual dues.

⁴ The Explanation and Justification for the definition of trade association at 11 CFR 114.8(a) states: “The general definition of a trade association is based on the treatment in the tax code of business associations. See Regulation Section 501(c)(6) of the Internal Revenue Code.” Federal Election Commission Regulations, *Explanation and Justification*, House Document No. 95-44, 95th Cong., 1st Sess. at 112 (1977). Neither AKFCF nor any of the

1 Commission regulations define a federation of trade associations as "an organization
2 representing trade associations involved in the same or allied line of commerce." 11 CFR
3 114.8(g)(1). In determining whether an entity is a federation of trade associations, the
4 Commission has examined a variety of organizational structures, which are typically composed
5 of one coordinating organization interconnected with regional (*e.g.*, State) organizations.
6 Notably, the Commission has concluded that an entity is a federation of trade associations when
7 a significant portion of its board of directors consists of representatives of the State trade
8 associations, and the State trade associations participate as principal or important units in the
9 governance of the federation. *See, e.g.*, Advisory Opinions 1998-19, 1995-17, and 1977-44.
10 Under AKFCF's by-laws, the highest governing body consists mostly of high-ranking officers of
11 the regional trade associations, and the Principal officers operating AKFCF on a day-to-day basis
12 must also be past or current officers of a regional association. Consistent with past
13 determinations by the Commission, AKFCF thus qualifies as a federation of the regional trade
14 associations.

15 Under 11 CFR 114.8(g)(1), a federation of trade associations may solicit contributions to
16 its SSF from the members of the federation's regional, state, or local affiliates or members
17 provided that the federation and the affiliates or members qualify as "affiliated" under the Act
18 and Commission regulations. "Affiliation" among the organizations is based on specific factors

regional associations files with IRS as an entity exempt from taxation under 26 U.S.C. 501(c)(6) because of an IRS interpretation, deferred to in *National Muffler Dealers Association, Inc. v. U.S.*, 440 U.S. 472 (1979), of the meaning of "business league" as used in that section. Under 26 CFR 1.501(c)(6)-1, an association's activities must be "directed to the improvement of business conditions of one or more lines of business," and the IRS has determined that an association that confines its membership to dealers in a particular brand name does not qualify as a "business league." Nevertheless, the wording of the Explanation and Justification of 11 CFR 114.8(a) merely provides a description of the type of organization that qualifies as a trade association and, by doing so, makes clear that Commission regulations do not require that the association qualify for a tax exemption under 26 U.S.C. 501(c)(6). As indicated above, the governing documents of AKFCF and the regional associations, as well as other information provided by you, indicate that the entities behave as non-profit, tax-exempt 501(c)(6) organizations.

1 set forth at 11 CFR 100.5(g)(4) (and repeated at 11 CFR 110.3(a)(3)). 11 CFR 114.8(g)(1).

2 These factors – which pertain to the relationship between sponsoring organizations as to
3 governance, common officers and personnel, financing, and the formation of the organizations –
4 are to be examined in the context of the overall relationship between sponsoring organizations.
5 *See* 11 CFR 100.5(g)(4)(i) and (ii)(A)-(J), and 110.3(a)(3)(i) and (ii)(A)-(J).

6 In past advisory opinions, many of the very facts that led to a conclusion that an entity
7 was an interconnected multi-tiered structure of regional or State trade associations, and hence a
8 federation of trade associations, were the same facts that also fit within the affiliation factors at
9 11 CFR 100.5(g)(4), and led to the conclusion that, in the context of their relationship, the
10 federation and the State or regional trade associations were affiliated with each other. *See*
11 Advisory Opinions 1998-19 and 1995-17. That is the situation presented here, and the
12 Commission concludes that AKFCF and the regional trade associations are affiliated.

13 Specifically, the governing documents of AKFCF indicate that the regional trade
14 associations have the ability to direct or participate in the governance of AKFCF through the
15 mandatory presence of three high-ranking officers from each regional association on AKFCF's
16 Board of Directors and the requirement that AKFCF's Principal officers must be selected from
17 among the other directors or from past or current officers of a regional association. *See* 11 CFR
18 100.5(g)(4)(ii)(B). In view of the required composition of AKFCF's Principal officers and of the
19 remainder of AKFCF's Board, which manages and directs AKFCF, the regional associations
20 also have the ability to hire, demote, or otherwise control AKFCF's officers and decisionmaking
21 employees. *See* 11 CFR 100.5(g)(4)(ii)(C). Moreover, this governance structure indicates an
22 overlap between the current directors of AKFCF and the current and former officers of the

1 regional associations. *See* 11 CFR 100.5(g)(4)(ii)(E) and (F). Finally, AKFCF was established
2 by the regional associations that were in existence at the time of its formation. *See* 11 CFR
3 100.5(g)(4)(ii)(I). The Commission also notes that the franchisee-members of the regional
4 associations elect the individuals who, by virtue of AKFCF's by-laws, automatically become the
5 majority of AKFCF's directors, thus further indicating a direct relationship between the
6 franchisee-members and AKFCF, via the regional associations.

7 2. *May AKFCF or AKFCF PAC solicit the owners and executive and administrative*
8 *personnel of the incorporated franchisee-members of the domestic regional associations,*
9 *and the families of those individuals, for contributions to AKFCF PAC? May AKFCF or*
10 *AKFCF PAC solicit contributions from unincorporated franchisee-members, including*
11 *individuals, of the domestic regional associations?*
12

13 Yes, under the conditions described below, AKFCF and AKFCF PAC may solicit the
14 owners and executive and administrative personnel of the incorporated franchisee-members of
15 the domestic regional trade associations, and the families of those individuals, for contributions
16 to AKFCF PAC. AKFCF and AKFCF PAC may also solicit contributions from unincorporated
17 franchisee-members, including individuals.

18 An incorporated connected organization and its SSF are subject to restrictions as to the
19 persons who may be solicited for contributions to the SSF. 2 U.S.C. 441b(b)(4)(A), (C), and
20 (D); 11 CFR 114.5(g)(1), 114.7(a), and 114.8(c). Specifically, under 11 CFR 114.8, a trade
21 association or its SSF may not solicit contributions from member-corporations themselves, but
22 may solicit contributions from the stockholders and executive and administrative personnel, and
23 their families, ("solicitable class") of the member-corporations that separately and specifically
24 approve the solicitations and that have not approved a solicitation by any other trade association

association comprised of Holiday Inn franchisees, as a "trade association").

1 for the same calendar year. 11 CFR 114.8(c).⁵ Section 114.8(g)(2) provides that, under those
2 conditions, a federation of trade associations or its SSF may also solicit contributions from the
3 solicitable class of the incorporated members of its affiliated trade associations. Thus, so long as
4 AKFCF receives prior approval on an annual basis from an incorporated franchisee-member of
5 one of the domestic regional associations, AKFCF or its PAC may solicit that member's
6 solicitable class for contributions to AKFCF PAC.

7 The provisions governing solicitations by membership organizations for contributions to
8 an SSF apply when a trade association or a federation of trade associations solicits contributions
9 from members that are individuals or unincorporated business entities.⁶ 11 CFR 114.7(c).
10 Individuals who are franchisee-members of the domestic regional associations, and the families
11 of these individuals, may be solicited for contributions to AKFCF without the need to seek and
12 obtain prior approval. 11 CFR 114.7(a) and (c). Unincorporated entities that are franchisee-
13 members of domestic regional associations may also be solicited without the need for prior
14 approval. AKFCF or AKFCF PAC may address solicitations for contributions from
15 unincorporated franchisee-members to the one or two individuals who normally represent the
16 unincorporated franchisee-member in its dealings with AKFCF or the regional association. *See*
17 *Advisory Opinions 1997-22 and 1995-27*. The solicitation may ask for contributions only from
18 the unincorporated entity itself, not from the one or two individual representatives or from the
19 stockholders or executive or administrative personnel of the member, unless such individuals
20 qualify as members in their own right. *See Advisory Opinions 1995-27 and 1988-03*.⁷

⁵ The requirements for separate and specific approval are described in 11 CFR 114.8(d) and (e).

⁶ Such entities would include partnerships, and those LLCs that do not elect to be treated as a corporation by the IRS and do not have publicly traded shares. *See* 11 CFR 110.1(g)(2) and (3); *see also* *Advisory Opinion 2001-07*.

⁷ AKFCF may also solicit contributions from the executive and administrative personnel (and families thereof) of the regional affiliates. 11 CFR 114.8(i)(2); *Advisory Opinion 2000-15*. *See also* 11 CFR 114.1(c) for the definition of "executive or administrative personnel."

This response constitutes an advisory opinion concerning the application of the Act and Commission regulations to the specific transaction or activity set forth in your request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any of the facts or assumptions presented, and such facts or assumptions are material to a conclusion presented in this advisory opinion, then the requestor may not rely on that conclusion as support for its proposed activity.

Scott E. Thomas
Chairman

Enclosures (AOs 2001-07, 2000-15, 1998-19, 1997-22, 1995-27, 1995-17, 1988-03, 1978-39, and 1977-44)